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A Limited Liability Partnership
Including Professional Corporations

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GARFIELD BEACH CVS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

ERIC T. HICKS,

Plaintiff,

v.

GARFIELD BEACH CVS, LLC,
THRIFTY PAYLESS, INC., STR.
9804,

Defendants.

Case No.

ED CV 10 - 00793

**NOTICE OF REMOVAL OF
ACTION PURSUANT TO 28 U.S.C.
1331, 1441 AND 1446 (FEDERAL
QUESTION JURISDICTION)**

[Second Amended Complaint filed:
April 28, 2010]

FILED

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U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
EASTERN DIVISION

VAP

(OPx)

1 TO THE HONORABLE JUDGES OF THE UNITED STATES
 2 DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA –
 3 EASTERN DIVISION AND TO PLAINTIFF:
 4

5 PLEASE TAKE NOTICE that Defendant Garfield Beach CVS, LLC
 6 (“Defendant”) hereby removes the matter of Eric T. Hicks v. Garfield Beach CVS,
 7 LLC, et al., Riverside County Superior Case No. INC 090728, from the Riverside
 8 County Superior Court to the United States District Court for the Central District of
 9 California – Eastern Division pursuant to 28 U.S.C. §§ 1331, 1441 and 1446.
 10

11 On October 27, 2009, Plaintiff filed his Complaint in the instant matter
 12 naming a nonexistent entity, "CVS Pharmacy Store 9804, a National Corporation."¹
 13 Plaintiff never properly served "CVS Pharmacy Store 9804, a National Corporation"
 14 or the Real Party in Interest Garfield Beach CVS, LLC with the Complaint. (Wong
 15 Decl., ¶ 2.) On December 10, 2009, Plaintiff filed a First Amended Complaint that
 16 continued to name the nonexistent entity, "CVS Pharmacy Store 9804, a National
 17 Corporation."² Again, Plaintiff failed to properly serve "CVS Pharmacy Store 9804,
 18 a National Corporation" or Real Party in Interest Garfield Beach CVS, LLC. (Wong
 19 Decl., ¶ 3.) Because Plaintiff could not effectuate service against the nonexistent
 20 entity, "CVS Pharmacy Store 9804, a National Corporation," and did not attempt to
 21 serve the Real Party in Interest Garfield Beach CVS, LLC's agent for process of
 22 service or anyone authorized to accept service on its behalf, no response to
 23 Plaintiff's complaints was filed. (Wong Decl., ¶¶ 2-3.)
 24

25 ¹ A true and correct copy of Plaintiff's Complaint is attached to the Declaration of
 26 Julie Wong ("Wong Decl.") as Exhibit A.

27 ² A true and correct copy of Plaintiff's First Amended Complaint is attached to the
 28 Wong Decl. as Exhibit B.

1 On March 2, 2010, Plaintiff requested the entry of default in this
 2 matter. (Wong Decl., ¶ 4.) On March 4, 2010, although Plaintiff improperly named
 3 "CVS Pharmacy Store 9804, a National Corporation" with respect to the requested
 4 entry of default, and did not serve either that non-existent entity or Real Party in
 5 Interest Garfield Beach CVS, LLC, in an abundance of caution, Real Party in
 6 Interest Garfield Beach CVS, LLC moved to set aside the entry of default and
 7 sought to file a motion to quash service. (Id.) On March 18, 2010, Plaintiff moved
 8 for leave of court to file a Second Amended Complaint in order to name, for the first
 9 time, the Real Party in Interest Garfield Beach CVS, LLC. (Id.)

10
 11 On April 28, 2010, the Court granted Real Party in Interest Garfield
 12 Beach CVS, LLC's motion to set aside the entry of default.³ (Id. at ¶ 5.) The Court
 13 also granted Plaintiff's request to file a Second Amended Complaint ("SAC"). (Id.)
 14 The Court further ordered Plaintiff to serve Garfield Beach CVS, LLC pursuant to
 15 the California Code of Civil Procedure. (Id.)

16
 17 On April 28, 2010, Plaintiff filed a SAC, which for the first time names
 18 Garfield Beach CVS, LLC as a defendant. Plaintiff's SAC asserts federal claims
 19 against Defendant under the Age Discrimination in Employment Act ("ADEA"), 29
 20 U.S.C. §§ 621, et seq. and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206,
 21 et seq. (Id. at ¶ 6.)⁴ Plaintiff's SAC was sent to counsel for Defendant by certified
 22 mail on May 4, 2010, but has not yet been served on Defendant. (Id.)

23
 24
 25
 26 ³ A true and correct copy of the Court's April 28, 2010 order is attached to the Wong
 Decl. as Exhibit C.

27 ⁴ A true and correct copy of Plaintiff's Second Amended Complaint is attached to
 28 the Wong Decl. as Exhibit D.

1 This action is a civil action over which this Court has original
2 jurisdiction pursuant to 28 U.S.C. § 1331, and is one that may be removed to this
3 Court by Defendant pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446,
4 because the Complaint poses federal questions. *See* 28 U.S.C. § 1331. The
5 following is a short, plain statement of the grounds for removal.

6 7 **GROUNDS FOR REMOVAL**

8 **FEDERAL QUESTION**

9 In his SAC, Plaintiff asserts a discrimination claim, which is alleged to
10 arise under both California state law and the federal ADEA, 29 U.S.C. §§ 621, et
11 seq. Plaintiff alleges that he was terminated by Defendant for discriminatory
12 reasons. Plaintiff alleges that his allegedly wrongful termination constitutes a
13 “willful violation” of the ADEA, and seeks “liquidated damages” for that alleged
14 violation, pursuant to 29 U.S.C. § 626(b).

15
16 Plaintiff also alleges that Defendant failed to maintain accurate records
17 regarding his hours worked and earnings, in violation of the FLSA, 29 U.S.C. § 201,
18 et seq. Specifically, Plaintiff asserts that Defendant has not maintained records as
19 required by the FLSA, and in the manner set forth in 29 C.F.R §§ 516.5 and 516.6.

20
21 The ADEA is a federal statute found in 29 U.S.C. §§ 621, et seq.
22 Similarly, the FLSA is a federal statute found in 29 U.S.C. §§ 201, et seq.
23 Accordingly, removal of this action is proper, pursuant to 28 U.S.C. § 1331, because
24 Plaintiff’s SAC sets forth federal questions over which this Court has original
25 jurisdiction.

1 **THIS NOTICE OF REMOVAL IS PROCEDURALLY CORRECT**

2 Defendant has filed this Notice of Removal in a timely fashion pursuant
 3 to 28 U.S.C. § 1446(b). Pursuant to 28 U.S.C. § 1446(b), a defendant must file a
 4 notice of removal within 30 days after service of the first pleading in a state court
 5 action that sets forth a removable claim. This 30 day period is measured from the
 6 point at which Defendant has notice of a removable claim. Notice of removability is
 7 determined by the “four corners of the applicable pleadings, not through subjective
 8 knowledge or a duty to make further inquiry.” Harris v. Bankers Life & Cas. Co.,
 9 425 F.3d 689, 694 (9th Cir. 2005); see also Whitaker v. American Telecasting, Inc.,
 10 261 F.3d 196, 206 (2d Cir. 2001).

11
 12 The 30 day period prescribed by 28 U.S.C. § 1446(b) does not begin to
 13 run until the defendant is served with a complaint which asserts a federal claim
 14 against the defendant. Receipt of a complaint by means other than effective service
 15 of process does not trigger the timing requirements of 28 U.S.C. § 1446(b). Murphy
 16 Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354 (1999.) When service
 17 becomes effective is determined by state law. City of Clarksdale v. BellSouth
 18 Telecommunications, Inc., 428 F.3d 206, 210 (5th Cir. 2005).

19
 20 Here, Plaintiff did not assert any claims against Defendant Garfield
 21 Beach CVS, LLC until filing his SAC, which was first filed on April 28, 2010.
 22 (Wong Decl, ¶ 6.) Defendant has not yet been served with the SAC, or Plaintiff's
 23 Complaint or First Amended Complaint, although Plaintiff sent a copy of the SAC
 24 to counsel for Defendant by mail on May 4, 2010. (Id.) Plaintiff's FAC asserts
 25 federal claims against Defendant. (Id.) Thus, by filing this Notice on May 28,
 26 2010, Defendant is well within the timing requirements of 28 U.S.C. § 1446(b),
 27 which have not even started to run. In addition, a copy of this Notice of Removal
 28 will be served on Plaintiff and filed with the Riverside County Superior Court.